MOTION FILED
OCT 29 1981

No. 80-1925

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED TRANSPORTATION UNION

Petitioner,

v.

LONG ISLAND RAILROAD COMPANY and METROPOLITAN TRANSPORTATION AUTHORITY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE, AND BRIEF AMICUS CURIAE OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS IN SUPPORT OF RESPONDENTS, LONG ISLAND RAILROAD AND METROPOLITAN TRANSPORTATION AUTHORITY

JOHN DEKKER
Director of Law
City Hall, 13th Floor
455 North Main Street
Wichita, Kansas 67202

JAMES B. BRENNAN
City Attorney
800 City Hall
Milwaukee, Wisconsin 53202

HENRY W. UNDERHILL, JR.
City Attorney
600 East Trade Street
Charlotte, North Carolina 28202

BENJAMIN L. BROWN
City Solicitor
101 City Hall
Baltimore, Maryland 21202

(Attorneys continued on inside front cover)

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

ROY D. BATES
City Attorney
City Hall
P.O. Box 147
Columbia, South Carolina 29217

GEORGE AGNOST
City Attorney
206 City Hall
San Francisco, California 94102

ROGER F. CUTLER
City Attorney
101 City & County Building
Salt Lake City, Utah 84111

STANLEY J. GARBER
Corporation Counsel
511 City Hall
Chicago, Illinois 60602

LEE E. HOLT
City Attorney
501 Municipal Building
Dallas, Texas 75201

GEORGE F. KNOX, JR.
City Attorney
174 E. Flagler Street
Miami, Florida 33131

WALTER M. POWELL
Municipal Counselor
309 Municipal Building
Oklahoma City, Oklahoma
73102

ALLEN G. SCHWARTZ
Corporation Counsel
100 Church Street
Room 6A-11
New York, New York 10007

J. LAMAR SHELLEY
City Attorney
48 North Macdonald Street
Mesa, Arizona 95201

AARON A. WILSON
City Attorney
28th Floor - City Hall
Kansas City, Missouri 64106

JOHN W. WITT
City Attorney
202 C Street
City Administration Building
San Diego, California 92101

MAX P. ZALL
City Attorney
City & County Building
Denver, Colorado 80202

CONARD B. MATTOX, JR., Esq.
309 Marston Avenue
Richmond, Virginia 23221

CHARLES S. RHYNE, Counsel
of Record
MARTHA B. PEDRICK
1000 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036
(202) 466-5420

Attorneys for National Institute of Municipal Law Officers as Amicus Curiae

October 1981

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1925

UNITED TRANSPORTATION UNION,

Petitioner,

v.

LONG ISLAND RAILROAD COMPANY and METROPOLITAN TRANSPORTATION AUTHORITY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Institute of Municipal Law Officers (NIMLO) moves the Court for leave to file the attached brief as amicus curiae in support of the Respondents, Long Island Railroad Company and Metropolitan Transportation Authority. The respondents have consented to the filing of the brief, but the petitioner has withheld consent. The letter granting consent has been lodged with the Clerk.

NIMLO submits that its brief can assist the Court in determining whether publicly owned and operated transit systems are integral and traditional governmental functions within the meaning of the principles of Federalism as expressed in *National League of Cities v. Usery*, 426 U.S. 833 (1976). NIMLO's interest in the issue is set out in the Interest of the Amicus Curiae section of the attached brief. That brief analyzes the historical development of transit operations in the United States from the days of private ownership and operation to the present situation of forced takeover and operation by state and local governments. It also considers the nature of the interest involved in the uninterrupted delivery of public transportation services.

Because of the widespread ownership and operation of transit systems by state and local governments, this case is of nationwide importance, and, we submit, the attached amicus brief will assist the Court in evaluating the nationwide importance of the decision in this case.

Therefore, we urge the Court to grant NIMLO leave to file the attached brief as amicus curiae.

Respectfully submitted,

JOHN DEKKER
Director of Law
City Hall, 13th Floor
455 North Main Street
Wichita, Kansas 67202

JAMES B. BRENNAN
City Attorney
800 City Hall
Milwaukee, Wisconsin
53202

HENRY W. UNDERHILL, JR.
City Attorney
600 East Trade Street
Charlotte, North Carolina
28202

BENJAMIN L. BROWN
City Solicitor
101 City Hall
Baltimore, Maryland
21202

ROY D. BATES
City Attorney
City Hall
P.O. Box 147
Columbia, South Carolina
29217

GEORGE AGNOST
City Attorney
206 City Hall
San Francisco, California
94102

ROGER F. CUTLER
City Attorney
101 City & County
Building
Salt Lake City, Utah 84111

STANLEY J. GARBER
Corporation Counsel
511 City Hall
Chicago, Illinois 60602

LEE E. HOLT
City Attorney
501 Municipal Building
Dallas, Texas 75201

GEORGE F. KNOX, JR.
City Attorney
174 E. Flagler Street
Miami, Florida 33131

WALTER M. POWELL
Municipal Counselor
309 Municipal Building
Oklahoma City, Oklahoma
73102

ALLEN G. SCHWARTZ
Corporation Counsel
100 Church Street
Room 6A-11
New York, New York
10007

J. LAMAR SHELLEY
City Attorney
48 North Macdonald
Street
Mesa, Arizona 95201

AARON A. WILSON
City Attorney
28th Floor - City Hall
Kansas City, Missouri
64106

JOHN W. WITT
City Attorney
202 C Street
City Administration
Building
San Diego, California
92101

MAX P. ZALL
City Attorney
City & County Building
Denver, Colorado 80202

CONARD B. MATTOX,
JR., Esq.
309 Marston Avenue
Richmond, Virginia 23221

CHARLES S. RHYNE,
Counsel of Record
MARTHA B. PEDRICK
1000 Connecticut Ave.,
N.W.
Suite 800
Washington, DC. 20036
(202) 466-5420

Attorneys for National Institute of Municipal Law Officers as Amicus Curiae

October 1981

TABLE OF CONTENTS

Page

Interest of the amicus curiae 1

Statement of the case 3

Summary of argument 4

Argument 6

I. The question in this case is whether a state-owned railroad, primarily engaged in the provision of commuter service to the working public, and only incidentally engaged in interstate freight operations, is an integral and traditional government function of state and local governments 6

II. The self-help provisions of the Railway Labor Act may not constitutionally be applied to the operation of a state-owned commuter railroad under our Nation's system of Federalism 9

A. The facts of public transit operations, as exemplified by the operation of the Long Island railroad, demonstrate that the provision of transit services to the public is an integral and traditional governmental function of state and local governments 10

B. This court's decision in *Hodel v. Virginia Surface Mining and Reclamation Association* is not determinative of the issue in this case 17

Conclusion 18

TABLE OF AUTHORITIES

Cases *Page*

American Public Transit Association v. Lewis, 655 F.2d 1272 (D.C. Cir.) 12

Hodel v. Virginia Surface Mining and Reclamation Association, No. 79-1538 (June 15, 1981) 17,18

Munn v. Illinois, 94 U.S. 113 11

National League of Cities v. Usery, 426 U.S. 833 ..... *passim*

United States v. California, 297 U.S. 175 4

Constitution, statutes and regulations:

United States Constitution, Tenth Amendment ..... *passim*

Clean Air Act, 42 U.S.C. §7401 *et seq.* 16,17

Fair Labor Standards Act, 29 U.S.C. §201 *et seq.* 10,18

National Labor Relations Act, 29 U.S.C. §152(2) 18

Railway Labor Act, 45 U.S.C. §151 *et seq.* 5,9,10

Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §1201 *et seq.* 17,18

Urban Mass Transportation Act of 1964, 49 U.S.C. §1601 *et seq.* 8,12,13

N.Y. Civ. Serv. Law §200 *et seq.* (McKinney 1973 and Supp. 1980) ("Taylor Law") 2,4,5,8

49 C.F.R. §§27.81-27.119 12

Miscellaneous:

A. Altschuler, Changing Patterns of Policy: The Decision-Making Environment of Urban Transportation, Public Policy, Spring 1977 13

American Public Transit Association, Transit Fact Book (1978-1979 ed.) 5,10,11,15

109 Congressional Record 5671-73 (1963) 8

46 Federal Register 37488 (July 20, 1981) 12

The Impact of Transportation on the Central Business District, Traffic Quarterly, October 1980 16

Institute of Public Administration, Financing Transit: Alternatives for Local Government, July 1979 .11,12,13,14

Public Transit and Downtown Development, Metropolitan, May-June 1980 16

University of Illinois at Chicago Circle, School of Urban Sciences, Moving People: An Introduction to Public Transportation, January 1981 7,8,11,12,13,15

Weekly Bond Buyer, July 13, 1981 15

Womack and Altschuler, An Examination of the Transit Funding Process at the Local Level, May 1979 10,15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1925

UNITED TRANSPORTATION UNION,

Petitioner,

v.

LONG ISLAND RAILROAD COMPANY and METROPOLITAN TRANSPORTATION AUTHORITY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

This brief *amicus curiae* is filed on behalf of the more than 1600 local governments, or political subdivisions of states, who are members of the National Institute of Municipal Law Officers (NIMLO). These member local governments operate NIMLO through their chief legal officer, variously called city or county attorney, corporation

counsel, city solicitor or law director and other titles, with each member local government having one vote on all actions which are cast by the organization. This brief *amicus curiae* is signed by the chief legal officers of NIMLO members on behalf of their own local government and the chief legal officers of the members of NIMLO in their official capacity.

The local government attorneys who participate in the work of NIMLO are responsible for advising local government officials, in cities and counties which own and operate a public transit system, on the subject of employment relations involving transit system employees. They assist in negotiating contracts between municipal transit systems and their employees, both through collective bargaining and through arbitration processes where they exist. They must also advise the local governing body when transit employees threaten and engage in strike actions.

Since *National League of Cities v. Usery*, 426 U.S. 833 (1976), local governments have structured their employment relations free of federal interference in those areas of integral and traditional government operations expressly identified by this Court. However, lack of guidance from this Court as to what constitutes integral and traditional governmental operations, produces uncertainty among local governments in providing public services.

The essential nature of public transit service and the very real threat of strikes by these public employees is of great concern to local government transit system owners. Laws such as New York's Taylor Law were enacted to prevent the interruption in the provision of essential government services such as public transportation. If the opinion of the Court of Appeals is left standing, it will

allow local government transit system owners to structure employment relations based on local needs and circumstances. Because the Court of Appeals properly analyzed the facts of the Long Island Railroad operations in determining whether those operations were integral and traditional governmental operations within the meaning of *National League*, NIMLO urges affirmance of the Judgment of the Court of Appeals.

STATEMENT OF THE CASE

The Long Island Railroad (LIRR) is a state-owned and operated railroad, primarily engaged in the transportation of passengers from counties in Long Island to their jobs and businesses in New York City, and incidentally in the hauling of freight in interstate commerce. Pet. App. 4a.[1] The Metropolitan Transportation Authority (MTA), an agency of the State of New York, purchased the LIRR from the Pennsylvania Railroad in 1966, based upon a determination that private enterprise could no longer continue to provide the service. Pet. App. 21a. In 1968, the LIRR became part of the largest public transit operation in the country as subway and bus transit operations transporting some 5.5 million daily passengers were added to the jurisdiction of the MTA. Brief in Opposition, at 4.

Prior to its conversion to public benefit corporation status in February, 1980, the LIRR's 6,900 employees

---

[1]In 1980, other railroads providing local passenger service in addition to freight services still maintained a high ratio of interstate freight revenue to aggregate revenue (96.9%) compared to the LIRR (4%). Brief in Opposition, at 6.

were the only employees of the MTA's work force of 50,000 public employees not covered by the Taylor Law. Brief in Opposition, at 6. Interestingly, one of the factors leading to enactment of the Taylor Law was the transit strike in 1966. Pet. App. 14a. The principal objective of the conversion to public benefit corporation status was to subject the LIRR employees to the Taylor Law. Brief in Opposition, at 3.

In light of the facts of the LIRR's operations, and the operation of public transit systems nationwide, the Court of Appeals held that the state's operation of a passenger rail service constituted an integral governmental function within the meaning of *National League of Cities v. Usery*, 426 U.S. 833 (1976), based on the finding that public transportation is a service that state and local governments are particularly suited to provide and have been forced to provide by a process of economic elimination of private suppliers. Pet. App. 18a. In addition, the Court found the importance of the LIRR's passenger service to the public greater than the state-operated freight line in *United States v. California*, 297 U.S. 175 (1936). Pet. App. 18a.

SUMMARY OF ARGUMENT

State and local governments have long been involved in the provision of transit service to the public, historically as grantors of franchises to private transit companies to occupy the public streets and, more recently, as owners and operators of transit systems. The determination of whether and when transit operations are an "integral and traditional governmental function" under *National League of Cities v. Usery*, 429 U.S. 833 (1976), requires an

examination of the facts of public transit as it exists today.

The State of New York faced the termination of commuter rail service provided by a privately-owned railroad to the public when operating and capital costs could no longer be financed from the revenue produced by the private system. Rather than lose this essential public service, the State had no choice but to purchase and operate the system. Forced public takeover as occurred in the case of the Long Island Railroad is typical of the forced public takeover, occurring over the last two decades, of privately owned transit systems nationwide. Although publicly owned systems represent only 48% of the transit industry, they carry 91% of all transit passengers and produce 90% of all operating revenues.[2]

One of the primary services performed by public transit systems is the transportation of persons from their homes to downtown jobs and businesses. Interruptions caused by employee strikes in this essential public service produce disastrous results for commuters, the city and state, and local businesses. The pressure on the public transit owner to avoid a strike is great. Laws like New York's Taylor Law were enacted to avoid the interruption in the delivery of public services caused by a strike. Application of the Railway Labor Act which would allow employees of a state-owned and operated commuter railroad to strike in contravention of the state law prohibiting strikes by public employees, displaces the state's ability to structure employment relationships in furnishing an essential public service in violation of state constitutional powers as described by

[2]American Public Transit Association, *Transit Fact Book*, 1978-1979 ed., at 38-39.

this Court's decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976).

With the advent of public takeover, a substantial program of government subsidization of capital and operating expenses has developed to maintain this essential public service. In conjunction with government subsidization of operating and capital costs, transit has become an important means of achieving governmental social, economic and environmental goals which benefit not only the transit passenger, but also the community in which the system operates.

The Court of Appeals properly analyzed the facts of the operation of the Long Island Railroad. Those operations were properly found to be an integral and traditional governmental function within the meaning of the principles set forth in Federalism as defined in *National League*.

ARGUMENT

I. THE QUESTION IN THIS CASE IS WHETHER A STATE-OWNED RAILROAD, PRIMARILY ENGAGED IN THE PROVISION OF COMMUTER SERVICE TO THE WORKING PUBLIC, AND ONLY INCIDENTALLY ENGAGED IN INTERSTATE FREIGHT OPERATIONS, IS AN INTEGRAL AND TRADITIONAL GOVERNMENTAL FUNCTION OF STATE AND LOCAL GOVERNMENTS

Public mass transportation systems, of which the Long Island Railroad (LIRR) is a part,[3] account for nearly 90% of the trips entering the central business district in cities like New York.[4] One of the primary services performed by these systems, as in the case of the LIRR, Brief for the Petitioner, at 13, is the transportation of persons from their homes to work and downtown businesses, and home again. Thus, the interest of the public transit system owner and operator in the uninterrupted functioning of the system is great. Disruption caused by labor strife is one of the greatest threats to the system's smooth operation and the economic stability of the community it serves.

At the very least, this case presents a very narrow question for decision by this Court. Both the Petitioners United Transportation Union (UTU), Brief, at 13, and the LIRR, Brief in Opposition at 3-4, agree that the LIRR is unique among operators of commuter railroads.[5] The high percentage of revenue derived from the LIRR's passenger service compared to that attributable to the hauling of freight in interstate commerce, which the Court of Appeals characterized as "but a fraction of the revenues of the LIRR," Pet. App. 10a, is not found elsewhere. The primary public interest, then, is in the smooth operation of the

---

[3]Under the jurisdiction of the Respondent Metropolitan Transportation Authority, the LIRR is part of the largest transit operation in the Nation, carrying some 5.5 million daily rail, subway and bus riders. Brief in Opposition, at 5.

[4]University of Illinois at Chicago Circle, School of Urban Sciences, *Moving People: An Introduction to Public Transportation*, January 1981, at 5, hereafter referred to as *Moving People*.

[5]The United States is in agreement noting that the majority of the business of other carriers is derived from freight operations. *Amicus Curiae* Brief of the United States, at 29-30, n.24.

system so that commuters get to their jobs and downtown businesses via public transportation. This is especially true in cities like New York where such a high percentage of trips into the central business district are via public transportation.[6]

The Taylor Law was enacted for the protection of the public to assure the orderly and uninterrupted operations and functions of government by prohibiting strikes by public employees. Pet. App. 14a. Continuous public transportation is among the most important of government operations, the uninterrupted functioning of which the Taylor Law was designed to assure.[7] A transit strike leaves many commuters stranded, unable to get to work, and results in severe financial losses to downdown businesses and thus to the city and state and to their employees.[8] A strike produces adverse environmental effects as commuters turn to automobiles, thereby adding to traffic congestion and increasing air pollution. The government interests involved in this case, then, are those of the public interest of New York rather than any overriding public need of the federal government. And, in light of the nature of public transit operations today, this Court must conclude

---

[6]*Moving People*, *supra*, n.4.

[7]As the Court of Appeals noted, the Taylor Law was in large part a response to the transit strike in 1966. Pet. App. 14a. Interestingly, the legislative history of Section 13(c) of the Urban Mass Transportation Act, 49 U.S.C. §1609(c) which requires as a condition of federal funding under that Act, that fair and equitable arrangements be made to protect the employees affected by the assistance, reveals that that section was not intended to supercede state laws forbidding public employee strikes. 109 Cong. Rec. 5671-73 (1963) (remarks of Senator Morse).

[8]A loss by New York City of $1.1 billion and $100 million daily by businesses during the 11 day transit strike in April 1980 was documented in the Court of Appeals. Pet. App. 15a.

that such operations are integral and traditional within the meaning of the principles of Federalism set forth in *National League* and other decisions of this Court.

II. THE SELF-HELP PROVISIONS OF THE RAILWAY LABOR ACT MAY NOT CONSTITUTIONALLY BE APPLIED TO THE OPERATION OF A STATE-OWNED COMMUTER RAILROAD UNDER OUR NATION'S SYSTEM OF FEDERALISM

In *National League of Cities v. Usery*, 426 U.S. 833 (1976), this Court held that the federal government could not, consistent with Federalism and the principles set forth in the Tenth Amendment, "exercise [its power to regulate commerce] so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made."[9] Application of the Railway Labor Act, which would allow employees of a state-owned and operated commuter railroad to strike in contravention of a state law which prohibits strikes by public employees is contrary to the public interests of states and local governments and displaces their ability to structure employer-employee relationships in discharging the dual functions of administering the public law and furnishing public services.[10]

There is no question that public transportation is a vital public service and that the state performs a vital public interest in providing it when private interests withdraw from this field of service. As the Court of Appeals noted, Pet. App. 15a, the freedom to strike has a negative influence on the collective bargaining process. The threat

[9] *National League of Cities, supra*, 426 U.S., at 855.

[10] *Id.*, at 851.

of a transit strike causes the public transit employer to agree to the payment of higher wages in order to avoid a strike.[11] The freedom to strike, embodied in the Railway Labor Act, displaces the state's decisions in structuring its employment relationships in the same manner as those decisions were displaced by the minimum wage and overtime provisions of the Fair Labor Standards Act, 29 U.S.C. §201 *et seq.*, when it was amended to include nearly all employees of state and local governments.[12]

A. THE FACTS OF PUBLIC TRANSIT OPERATIONS, AS EXEMPLIFIED BY THE OPERATION OF THE LONG ISLAND RAILROAD, DEMONSTRATE THAT TRANSIT IS AN INTEGRAL AND TRADITIONAL GOVERNMENTAL FUNCTION OF STATES AND LOCAL GOVERNMENTS

Transit operations in the United States have evolved from that of a public service provided primarily by the private sector to one which is today, of necessity, virtually exclusively provided by government.[13] Governmental in-

[11]Womack and Altschuler, *An Examination of the Transit Funding Process at the Local Level*, May 1979, at 18 "(While [public officials] may also feel pressure from voters and taxpayer groups if additional revenues must be found to pay wage settlements, these only come much later and permit more flexibility in diffusing the blame.) Hereafter referred to as *Transit Funding Process*.

[12]Fair Labor Standards Amendments of 1974, amending 29 U.S.C. §201 *et seq.*

[13]Publicly owned transit systems carry 91% of all transit passengers. 90% of the operating revenues of transit systems nationwide are derived from public transit systems. *Transit Fact Book*, *supra*, at 38-39.

volvement in transit operations, though, is certainly not new.[14] This dramatic and relatively recent forced rise in public ownership and operation of transit systems grew out of an overall decline in the use and revenues of the private transit industry following World War II.[15] During the same period, increased operating costs added to the private transit system owner's financial difficulties.[16] In the mid-1960s, operating costs were approximately equal to operating revenues. In 1974, operating expenses were more than one and one half times greater than operating revenues.[17] Small wonder that private operators quit this field of service!

Several factors have been identified as contributing to the decline in the local transit industry. The general move out of the central city and into the suburbs with the accompanying rise in the use of the automobile was a

---

[14]*Munn v. Illinois*, 94 U.S. 113, 125 (1876) "[In the exercise of the police power] it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen. . .and in so doing to fix a maximum charge to be made for services rendered. . . ."

[15]In 1950, transit carried 13.8 billion passengers. By 1977, ridership had decreased to 5.7 billion. *Moving People*, *supra*, at 5.

[16]Between 1950 and 1970, operating costs per transit mile increased an average of approximately 4.2% per year while the consumer price index for the same years increased an average of only approximately 2.4% per year. Institute of Public Administration, *Financing Transit: Alternatives for Local Government*, July 1979, at 8-9, hereafter referred to as *Financing Transit*.

[17]*Transit Fact Book*, *supra*, at 20-21.

major factor.[18] Increased labor costs were another factor.[19] A third factor was the cost of accomplishing certain governmental social and environmental goals, among them the provision of special services for school children, the elderly[20] and the handicapped.[21] The cost of complying

---

[18]*Moving People, supra*, at 15-16, 18. Given the lower density in suburban areas, the cost of transit service per passenger greatly increased. Another phenomenon known as "peaking," or the concentration of riders during the rush hours, in combination with labor contracts requiring overtime for hours worked in excess of eight, actually makes rush hour service more costly than non-rush hour services.

[19]A substantial proportion (75%) of operating expenses are attributable to wages and related benefits. In 1950, the average annual transit wage was higher than the wages of manufacturing and city employees. Between 1950 and 1975 the rate of increase in transit wages was more than 50% greater than that for manufacturing employees. *Financing Transit, supra*, at 8, 11.

[20]Rates for the elderly and handicapped during non-peak hours may not exceed one-half of the rates generally applicable during peak hours. 49 U.S.C. §1604(m).

[21]Based on the requirements of §504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C §794, and §16 of the Urban Mass Transportation Act, as amended, 49 U.S.C. §1612, requiring that mass transit be accessible to the handicapped and elderly, the Department of Transportation adopted implementing regulations, in conformance with the HEW guidelines, which became effective May 31, 1979. 49 C.F.R. §§27.81-27.119 (1979). The regulations were found to exceed the Department of Transportation's authority under §504. *American Public Transit Association v. Lewis*, 655 F.2d 1272 (D.C. Cir. 1981). The Department of Transportation has promulgated an interim rule requiring recipients of federal funds to certify that special efforts to provide transportation that handicapped persons can use are being made pending reconsideration of the regulatory requirements under § §504 and 16. 46 Fed. Reg. 37488 (July 20, 1981).

with conditions attached to federal and state subsidies has contributed to an overall decline in system productivity as measured by revenue passengers per employee during the period between 1950-1976.[22]

Faced with the prospect of losing essential transit service, state and local governments have been forced to purchase and operate the private systems. With enactment of the Urban Mass Transportation Act of 1964 (UMTA), 49 U.S.C. §1601 *et seq.*, the federal government made federal funds for acquisition of private systems available.[23] Since enactment of the UMTA, the federal government has been heavily involved in the subsidization of public transit systems.[24]

The history of the operation of the Long Island Railroad fits the pattern of forced takeover by state and local governments of financially troubled private systems as the only alternative to loss of this essential public service. The financial difficulties of the LIRR were typical of other privately owned commuter railroads. Brief in Opposition, at 12.

---

[22]*Financing Transit*, *supra*, at 2. Among the conditions adding to labor costs identified by one commentator are the prevailing wage requirements, 49 U.S.C. §1609(a), and the requirement that the Secretary of Labor determine that "fair and equitable arrangements are made. . . to protect the interests of employees affected by [federal] assistance." 49 U.S.C. §1609(c). Generally, the Secretary will grant certification only if all affected unions concur. Competitors threatened by publicly aided service improvements are generally entitled to compensation or are bought out. 49 U.S.C. §1602(e). A. Altschuler, Changing Patterns of Policy: The Decision-Making Environment of Urban Transportation, *Public Policy*, Spring 1977, at 171, 194.

[23]Funds for acquisition are authorized under 49 U.S.C. §1602.

[24]The federal government contributes 80% of the total financial assistance for capital expenditures and 10.9% of all operating assistance. *Moving People*, *supra*, at 70.

As the Court of Appeals noted, the state's purchase of the railroad in 1966 "was premised on its finding that private enterprise would be unable to continue to own and operate the facility." Pet. App. 21a, n.27.

The LIRR is the only common carrier railroad serving Long Island. Brief for Petitioner, at 10. It carries a daily ridership of 260,000 which is primarily commuter in nature, Brief in Opposition, at 9, generally of the home to work type. Brief for Petitioner, at 13. The railroad receives the benefit of substantial federal subsidization since its takeover by the state, having received an estimated $450,000,000 between 1967 and 1980. Brief for Petitioner, at 10, n.7.

The mere fact of forced public takeover and operation of such a substantial portion of the private transit industry over the last two decades should be sufficient to satisfy *National League's* test of integralness. But, there are other distinguishing features of public transit operations which lend support to the argument.

Although transit is not a free public service due to the tradition of charging fares, it is not a self-supporting public utility like telephone or electric utilities. Transit competes with individual motorists while utility companies enjoy the status of government-protected monopolies.

After forced public takeover, the transit system has ceased to operate as it did when privately owned. Increased costs are not always passed on to the consumer as is the case with other utilities. Nor are fares necessarily tied to transit costs per passenger.[25] On the contrary, increasingly

[25]Between 1950 and 1970, fares rose slightly less than transit costs per passenger. However, between 1970 and 1975, transit costs per passenger rose 14.3% per year while fares rose only 3.6% per year. *Financing Transit, supra*, at 8, 10.

less and less of the operating expenses are recovered from fares.[26] Rather, publicly owned transit systems are supported by tax revenues from transit and non-transit riders who also benefit indirectly from transit service.[27]

Public takeover has not cured the financial problems of transit systems. Despite heavy subsidization, transit continues to operate at a deficit.[28] In 1978, transit operating expenses exceeded operating revenues by $30.6 million.[29] As public takeover has occurred, public attitudes toward the financing of transit have changed.[30] There is a great reluctance to raise fares in cities experiencing public takeovers, accompanied by pressures to provide special services and higher wages to avoid transit strikes.[31]

---

[26]Prior to World War II, nearly all operating and capital expenses were recovered from revenue attributable to fares. By the 1960s, only operating costs were recovered from fares, and by the late 1970s, fares accounted for only half of all operating expenses and none of the capital costs. *Moving People*, *supra*, at 15.

[27]In 1979, over $129 million in taxpayers' funds were invested by the state in the LIRR for operating expenses alone. Between 1966 and 1980, hundreds of millions of dollars in state subsidies have been invested for capital expenses. Brief in Opposition, at 6.

[28]The threatened loss of federal operating and capital subsidies will, for many systems heavily dependent on federal aid, make a bad situation worse. *The Weekly Bond Buyer*, p. 5, July 13, 1981.

[29]*Transit Fact Book*, *supra*, at 20-21.

[30]*Transit Funding Process*, *supra*, at 4.

"In our case study cities we found a widespread expectation that public ownership and subsidization would stabilize transit finances by reducing operating costs (through new capital) and by helping to attract new riders. However, more nearly the opposite has occurred: unit costs (per vehicle mile and per passenger) have increased rapidly in constant dollars during the period of public, subsidized operation. Consequently, the amount of public support needed to continue systems operations at a given level has continued to grow rapidly. . . ."

[31]*Id.*, at 18.

Finally, aided by heavy government subsidization, transit has become an integral component of the local government planning process. That process is designed to achieve governmental social, economic and environmental goals for the benefit of society as a whole and not just the transit passenger.

Transportation planning has become an integral component of the overall comprehensive land use planning process occurring at the local level. The availability of public transportation allows land in the central business district to be used at its highest potential, for commercial office space, thus reducing its use for traffic and parking needs.[32] This is dramatically illustrated by the facts in this case. State officials have estimated that 52 additional lanes of expressway going into and out of New York City would be required to accommodate traffic if the LIRR went out of service and 10 city blocks would be needed solely for parking. Pet. App. 17a. Access to public transportation attracts economic development, thus aiding urban revitalization efforts.[33]

Public transportation figures prominently in the governmental goal of achieving cleaner air as found in the Clean Air Act.[34] The consistency requirements of the UMTA illustrate the importance of public transportation to the governmental planning process designed to achieve this

---

[32]The Impact of Transportation on the Central Business District, *Traffic Quarterly*, October 1980, p. 523.

[33]Cities have experienced considerable growth in construction of commercial office space in the vicinity of public transit stations. Public Transit and Downtown Development, *Metropolitan*, May-June 1980, at 48.

[34]42 U.S.C. §7401 *et seq.*

goal. Activities approved, supported or funded by the Department of Transportation must conform to the State Implementation Plan required under the Clean Air Act.[35]

As government involvement in transit service has grown, the benefits accompanying transit have spread beyond transit users to all segments of society. It is doubtful that such governmental goals as urban revitalization, clean air and energy conservation would be attainable if public takeover had not occurred. The only conclusion to draw is that public transit operations are and have been integral operations of traditional governmental functions.

B. THIS COURT'S DECISION IN *HODEL V. VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION* IS NOT DETERMINATIVE OF THE ISSUE IN THIS CASE.

Appellant's reliance on this Court's recent decision in *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. ____ (June 15, 1981) is misplaced. Brief for Petitioner, at 19. *Hodel* involved a challenge, based on the Tenth Amendment and the principles of Federalism as expressed in *National League*, to the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §1201 *et seq.* (Mining Act).

We submit that *Hodel* is not determinative of the issue in this case. As found by this Court, the regulatory scheme employed in the Mining Act was one of "cooperative federalism." It did not require the state to participate in the Federal program. Slip op., 22. Rather, the challenged

[35] 42 U.S.C. §7506(c).

provisions of the Mining Act governed only the activities of the private coal operators and thus the requirement of *National League* that the challenged federal statute must regulate "States as States" was not met. Slip op., 21

Unlike the challenge in *Hodel*, the challenge here, as in *National League*, is to the direct application of a federal statute, the Railway Labor Act, to the state of New York as employer to limit its decisions as to the structuring of its employment relations. There is no program of cooperative federalism involved here. The governmental transit system owner has no choice whether or not to be governed by the Railway Labor Act, just as it had no choice whether to comply with the Fair Labor Standards Act.

Moreover, this Court in *Hodel* noted the national interest in the environment and the economy as affected by the surface mining industry. Slip op., 12. No such national interests exist here. Rather, the interest in this case is in avoiding interruptions in the provision of public services, and this interest is purely local. Congress recognized the local nature of this interest when it exempted all municipal labor relations from the provisions of the National Labor Relations Act, 29 U.S.C. §152(2).

CONCLUSION

Faced with the certain prospect of losing public transit services provided by privately owned and operated transit companies, state and local governments have been forced in locality after locality to purchase the financially troubled private systems all over our Nation in order to continue to provide this essential public service. Typically, employees of the private transit company have become public employees.

With the aid of substantial federal, state and local subsidies, transit has become an integral part of the governmental planning process and is the vehicle for the accomplishment of governmental social, economic and environmental goals which aid not only the transit rider, but society as a whole.

Public employee labor relations have traditionally been matters of local interest, as distinguished from matters of national interest. Strikes by public employees are the greatest threat to the delivery of public services by state and local governments. Local laws such as New York's Taylor Law are designed to assure the uninterrupted delivery of essential governmental services to the public.

Public transportation is one such service the interruption of which produces drastic results. The operations of the LIRR are an integral component of the largest public local transit operation in this Nation. This Court should not allow this case to turn on the incidental 4% freight operations of that railroad.

The concept of what is an integral governmental function should not be static because governing is not static. Whether it takes a year or several years of public operation to denominate a public function as a traditional governmental function, there can be no doubt that public transit operations are an integral and essential governmental service under the facts of our day. The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

JOHN DEKKER
Director of Law
City Hall, 13th Floor
455 North Main Street
Wichita, Kansas 67202

JAMES B. BRENNAN
City Attorney
800 City Hall
Milwaukee, Wisconsin
53202

HENRY W. UNDERHILL, JR.
City Attorney
600 East Trade Street
Charlotte, North Carolina 28202

BENJAMIN L. BROWN
City Solicitor
101 City Hall
Baltimore, Maryland 21202

ROY D. BATES
City Attorney
City Hall
P.O. Box 147
Columbia, South Carolina 29217

GEORGE AGNOST
City Attorney
206 City Hall
San Francisco, California 94102

ROGER F. CUTLER
City Attorney
101 City & County Building
Salt Lake City, Utah 84111

STANLEY J. GARBER
Corporation Counsel
511 City Hall
Chicago Illinois 60602

LEE E. HOLT
City Attorney
501 Municipal Building
Dallas, Texas 75201

GEORGE F. KNOX, JR.
City Attorney
174 E. Flagler Street
Miami, Florida 33131

WALTER M. POWELL
Municipal Counselor
309 Municipal Building
Oklahoma City, Oklahoma 73102

ALLEN G. SCHWARTZ
Corporation Counsel
100 Church Street
Room 6A-11
New York, New York 10007

J. LAMAR SHELLEY
City Attorney
48 North Macdonald Street
Mesa, Arizona 95201

AARON A. WILSON
City Attorney
28th Floor - City Hall
Kansas City, Missouri 64106

JOHN W.WITT
City Attorney
202 C Street
City Administration
Building
San Diego, California
92101

MAX P. ZALL
City Attorney
City and County Building
Denver, Colorado 80202

CONARD B. MATTOX,
JR., Esq.
309 Marston Avenue
Richmond, Virginia 23221

CHARLES S. RHYNE,
Counsel of Record
MARTHA B. PEDERICK
1000 Connecticut Ave.,
N.W.
Suite 800
Washington, D.C. 20036
(202) 466-5420

Attorneys for National Institute of Municipal Law Officers as Amicus Curiae

October, 1981